No. 96-1174

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JEFFREY NIELSEN,
Petitioner,
v.
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LOCAL LODGE 2569; INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO-CLC, and MERCY AMBULANCE OF FORT WAYNE, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR THE INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LOCAL LODGE 2569 AND INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO-CLC

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The opinions below, the basis for this Court's jurisdiction and the statutory provisions involved are correctly set out in the petition for a writ of *certiorari*. Pet. 1-3.

STATEMENT OF THE CASE

1. The petitioner, Jeffrey Nielsen, is employed by Mercy Ambulance of Fort Wayne, Inc. Local Lodge 2569 of the International Association of Machinists & Aerospace Workers ("Union") represents the Mercy Ambulance bargaining unit in which Nielsen is employed. The

applicable collective bargaining agreement contains an "agency shop" clause providing that, "[a]s a condition of continued employment, all [covered] employees . . . shall either become a member of the Union and pay dues thereto, or in lieu thereof, shall pay thereto . . . an amount equal to the regular monthly dues and fees in effect for other employees in the bargaining unit who are members of the Union." Pet. App. 4a-5a.

2. The International Association of Machinists & Aerospace Workers ("IAM"), in its turn, has instituted a procedure through which employees may exercise their rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to limit their agency fee payments to representational activities that are chargeable to objecting fee payers. This objection procedure is explained to IAM-represented employees in a notice that is published annually in the IAM newspaper, *The Machinist*, and mailed to the employees' homes. Pet. App. 5a. The court of appeals accurately described the content of the notice:

> The notice began by explaining that "[e]mployees working under collective bargaining agreements containing union security clauses are required, as a condition of employment, to pay monthly dues or fees to the union. This is their sole obligation to the union, regardless of the wording of the clauses." It then specified three different categories of employee: union members, who pay monthly dues; nonmembers, who pay an equivalent "agency fee"; and nonmember objectors, who can exempt themselves from funding expenditures that are non-germane to the collective bargaining process. After explaining some of the benefits of collective bargaining and union membership and describing what expenditures are considered germane and non-germane, the notice set forth the process by which an individual could become a fee objector. [Pet. App. 5a-6a.]

As the court of appeals explained, the IAM objection procedure works on an annual basis. For this reason,

the procedure provides for objections to be made during an annual monthly window period—January of each year —or during the first thirty days of employment. Pet. App. 6a.[1]

3. The sequence of events here is as follows. In February 1992, Nielsen began his employment at Mercy Ambulance. Shortly after commencing employment Nielsen joined the Union. Pet. App. 4a.

In December 1993, Nielsen received the IAM's annual objection notice, which, as the court of appeals noted, explains that "there would be a 'window period' between January 1 and 31 of each year, during which an objector was entitled to request that his or her monthly agency fee payment be reduced to reflect only representational expenses." Nielsen did *not* take any steps to resign from Union membership and invoke the IAM objection procedure during the January 1994 window period. Pet. App. 6a.

Then, in July 1994, Nielsen did resign from Union membership and attempt to file an objection to the payment of full agency fees. The Union honored Nielsen's resignation from membership. However, the Union rejected Nielsen's objection as untimely since the objection was not made during the January window period. Pet. App. 6a-7a.

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[1] The court of appeals described the objection procedure's operation as follows:

> Fee reductions were based on the audited figures from the previous fiscal year, with adjustments made near the end of the calendar year if necessary. Objectors who were dissatisfied with the final reduction had the right to file a challenge to the calculation. In that event, the notice informed its readers that there would be an "expeditious appeal" before an impartial arbitrator chosen through the American Arbitration Association's Rules. All appeals relating to the year were to be consolidated. The union was to bear the cost of the arbitration and the burden of justifying its calculations. Last, fee objectors were required to renew their request for reduction of fees on an annual basis. [Pet. App. 6a.]

Lastly, in November 1994, Nielsen again received the IAM's annual objection notice. And, on this occasion Nielsen *did* file an objection during January 1995—the window period for filing such objections stated in the notice. The IAM, accordingly, treated Nielsen as an objecting fee payer for 1995. Pet. App. 7a.

Nielsen brought suit challenging the agency shop clause as facially unlawful and challenging the Union's application of the window period to bar his objection for the last part of 1994. Both of the courts below rejected these claims.

ARGUMENT

The *certiorari* petition presents a single question—whether "a union [may] enforce a *Beck* 'window period' " with respect to "employees who resign from union membership" and file an agency fee objection at the same time. Pet. i. The court of appeals answered that exceedingly narrow question correctly. And, as that court stated in so doing, the "[o]ther courts that have considered [challenges to] 'window periods' have come to the same conclusion." Pet. App. 22a.[2] *Certiorari* should, therefore, be denied.

1. The opinion of the court of appeals below begins by noting that Nielsen's "claims against IAM . . . arise under the duty of fair representation contained in § 8(b)(1)(A) of the NLRA" and that a union breaches the duty "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside of a 'wide range of reasonableness' . . .

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[2] The court of appeals cited *Abrams v. Communications Workers of America*, 59 F.3d 1373, 1381-82 (D.C. Cir. 1995), *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987), *Andrews v. Education Ass'n of Cheshire*, 653 F. Supp. 1373, 1378 (D. Conn.), *aff'd*, 829 F.2d 335 (2d Cir. 1987), and *Kidwell v. Transportation Communications Int'l Union*, 731 F. Supp. 192, 205 (D.Md. 1990), *aff'd in part, rev'd in part on other grounds*, 936 F.2d 283 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992). Pet. App. 22a-23a.

as to be irrational." Pet. App. 14a-15a, quoting *Air Line Pilots Ass'n v. O'Neill,* 499 U.S. 65, 67 (1991). *Accord I.U.E. v. NLRB,* 41 F.3d 1532, 1537 (D.C. Cir. 1994) (applying established DFR standards to claims arising under *Beck*); *Price v. International Union, U.A.W.,* 927 F.2d 88, 92 (2d Cir.), *cert. denied,* 502 U.S. 905 (1991) (same).

The court of appeals explained in detail the reasons for limiting the time for making objections:

> The district court noted that without the limited time period for filing and processing objections, the program would be unworkable:
>
> > Each annual objection necessitates revisions in the records of three organizations, each of which is entitled to a percentage of the fees which must be reduced: the local union, the intermediate union or district lodge, and the International Union. Objections can potentially come from any of the 1300 local unions, representing approximately 500,000 employees, and currently it costs IAM over $200,000 to operate its dues reduction system. Under the IAM procedures, each objector has an opportunity to challenge the fee reduction calculation in a union-funded arbitration procedure. [Pet. App. 21a.]

In evaluating these justifications for a window period rule, the court of appeals observed:

> Life is full of deadlines, and we see nothing particularly onerous about this one. When people miss the deadline for filing an appeal to this Court, their rights can be lost forever, not just for eleven months, but that does not make time limits for filing appeals in violation of the law. [Pet. App. 22a.]

Again this background, the court of appeals had no trouble concluding:

> It is not unreasonable for a union to require existing members or full fee nonmembers to voice their objec-

> tions in a timely fashion, and to be aware that the price of not doing so will be to wait at most ten or eleven months before implementing their new status. [Pet. App. 22a.]

2. The *certiorari* petition acknowledges that "[s]everal appellate courts have upheld internal union 'window periods' as a general matter, at least with regard to employees who are already nonmembers in the union." Pet. 15. But the petitioner argues that the window period should not have applied to his mid-year, post-resignation objection, because "a newly resigned nonmember [is] someone akin to a new hire, who has never before exercised his right to object (because he never in fact had that right). . . ." Pet. 17.

The premise of this argument—stated in parentheses in the foregoing quotation—is false. Nielsen—like all employees in a like situation—"in fact had th[e] right [to object]." Pet. 17. Nielsen received notice of the January 1994 window period during December 1993. He was free to resign from Union membership at that time and file a timely objection. Had he done so in January 1994, the Union would have honored his objection, as it did in January 1995. See Pet. App. 6a-7a.

In sum, when Nielsen sat out the 1994 window period and attempted to file an untimely objection later in the year after resigning from the Union, he stood in no different position than a nonmember employee who sat out the window period and later filed an untimely objection.

New hires are in a completely different position in this regard from recently resigning Union members. This is so, because a person hired after the window period has closed will not have the opportunity to file a timely objection during the year. For just this reason, the IAM objection procedure allows new hires to file objections within the first thirty days of employment. Pet. App. 6a.

3. The *certiorari* petition does, to be sure, cite a single authority "rul[ing] that 'window periods' could not be applied to newly-resigned nonmembers (like Nielsen)." Pet. 17 citing *California Saw & Knife Works*, 320 NLRB 224, 235 (1996), pending on petition for review *sub nom, Int'l Ass'n of Machinists v. NLRB*, No. 96-1246 (7th Cir.). But precisely because that ruling is pending on review—and pending in the very court of appeals that decided the instant case—it does not portend any conflct in the lower court law requiring resolution by this Court. Indeed, in the instant case, the court of appeals took note of *California Saw* and criticized that decision for "giv[ing] no weight at all to the union's legitimate administrative needs" and as being inconsistent with this Court's fair representation precedents, "which require [courts] to uphold the union's actions as long as they fall within a generous range of reasonableness." Pet. App. 23a.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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